86-970

Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

in the Supreme Court of the United States

October Term, 1986

MANUEL BINKER

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Of Counsel:
Jacob M. Denaro
504 Dadeland Square
7700 N. Kendall Drive
Miami, Florida 33156
(305) 274-9550

Richard A. Sharpstein
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133
(305) 442-8100

MELVIN S. BLACK
Suite 1002, Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622
Counsel for Petitioner

QUESTIONS PRESENTED

I.

WHETHER THE DOCTRINE OF "DUE DILIGENCE" REQUIRES CONSOLIDATION OF CONSIPIRACY AND RICO PROSECUTIONS WHEN ALL FACTS FOR BOTH PROSECUTIONS ARE KNOWN PRIOR TO COMMENCEMENT OF THE FIRST CASE AND THE CONSPIRACY IS A PREDICATE ACT OF RICO

II.

WHETHER, AS A MATTER OF LAW, THE OFFENSES OF CONSPIRACY TO IMPORT AND CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE MARIJUANA FOR WHICH PETITIONER HAD PREVIOUSLY BEEN TRIED ARE LESSER INCLUDED OFFENSES OF THE RICO CONSPIRACY AND SUBSTANTIVE RICO OFFENSES IN THE PRESENT INDICTMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-

in the Supreme Court of the United States

October Term, 1986

MANUEL BINKER

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Manuel Binker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 15, 1986, and Petition for Rehearing denied on October 20, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *United States v. Binker*, ____ F.2d ____ (11th Cir. 1986) and is reprinted in the appendix hereto at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 15, 1986. A petition for rehearing was sought and denied on October 20, 1986. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On January 9, 1985, the Defendant was indicted in the United States District Court for the *Southern District of Florida,* by an Indictment which charges in pertinent part as follows:

"Count I—RICO—Conspiracy

> The defendants FAIZ J. SIKAFFY, GERARD LATCHINIAN and MANUEL BINKER, together with other individuals known and unknown to the Grand Jury, did constitute an enterprise . . .
>
> * * *
>
> From an unknown date, but a least as early as March 1, 1984, up to and including November 1, 1984, at Miami, Dade County, within the Southern District of Florida and elsewhere, the defendants . . . did unlawfully, willingly and knowingly combine, conspire, confederate and agree together and with each other to conduct and participate directly and indirectly in the conduct of the affairs of this enterprise through a pattern of racketeering activity . . .
>
> * * *

The aforesaid pattern of racketeering activity consisted of violations of: Title 21, United States Code, Sections *841 (a)(1)* and *846* . . .

* * *

Racketeering Act No. 2 — Conduct Involving Attempted Importation of Marijuana Aboard "Harry I"

* * *

The defendants FAIZ J. SIKAFFY and MANUEL BINKER organized and financed the attempted importation *into Florida and Louisiana* of in excess of 40,000 pounds of marijuana on board the vessel "Harry I," a portion of which was brought into the United States before the vessel was seized by the United States Coast Guard on the high seas.

* * *

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed the following overt acts, among others, within the Southern District of Florida and elsewhere:

1. In or about May, 1984, the defendant SIKAFFY and others traveled from Miami, Florida to Port-au-Prince, Haiti, to supervise

plans for the vessel "Harry I" to meet another ship and receive a multi-ton quantity of marijuana.

2. In or about May and June, 1984, the defendant BINKER caused the vessel "Sea Crust" to meet the vessel "Harry I" and to receive a quantity of marijuana which was then transported into the Southern District of Florida.

3. On or about June 6, 1984, the defendants SIKAFFY and others travelled from Miami, Florida and the State of Louisiana to the vicinity of Clearwater, Florida, in order to purchase the "Utopia II", a boat intended to be used to off-load marijuana from the vessel "Harry I."

4. In or about May and June 1984, the defendants SIKAFFY and BINKER guided, and caused others to guide, the movements of the "Harry I" at sea by means of telephone and ship-to-shore radio communications to and from Miami, Florida and the State of Louisiana.

5. In or about May and June 1984, the defendant SIKAFFY caused an individual known to the Grand Jury to pilot aircraft on flights over the Gulf of Mexico to locate the "Harry I" and to provide logistical support to the efforts to off-load its cargo of marijuana.

6. In or about June, 1984, the defendant SIKAFFY and others travelled from Miami,

Florida to the Republic of Mexico to procure fuel and other provisions for the vessel "Harry I."

7. In or about June through September 1984, in Miami, Florida, the defendant BINKER delivered hundreds of thousands of dollars in United States currency to the defendant SIKAFFY."

Count II in the Southern District of Florida charges a substantive RICO violation based upon the actual conduct of the alleged enterprise and states in pertinent part that:

"the defendants, FAIZ J. SIKAFFY, GERARD LATCHINIAN and MANUEL BINKER, and other persons known and unknown to the Grand Jury, being employed by and associated with the enterprise described in Paragraph 2 of Count I . . . in violation of Title 18, United States Code, Section 1952, Title 21, United States Code, Section *841(a)(1),* 843(b), *846, 952(a),* and *963* . . ."

On November 16, 1984, two months before the Florida Indictment, the Defendant was originally charged in the *Eastern District of Louisiana,* Case No. 84-454, by an Indictment which charged in pertinent part as follows:

COUNT V

Beginning at a time unknown, but at least since January, 1984, and continuing through June 26, 1984, in the Eastern District of Louisiana and

elsewhere, FAIZ J. SIKAFFY, MANUEL BINKER a/k/a Manolo, MIGUEL CANAHUATI, HECTOR PEREZ a/k/a Primitivo Perez, CURTIS SAUCIER, MICHAEL SURIANO and other known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to unlawfully import into the Untied States from a place outside thereof in excess of 1,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a), said marijuana being on board the vessel *"Harry I"*, all in violation of Title 21, United States Code, *Section 963.*

* * *

COUNT VI

Beginning at a time unknown, but at least since January 1984, and continuing through June 26, 1984 in the Eastern District of Louisiana and elsewhere, FAIZ J. SIKAFFY, MANUEL BINKER a/k/a/ Manolo, MIGUEL CANAHUATI, HECTOR PEREZ a/k/a Primitivo Perez, CURTIS SAUCIER, MICHAEL SURIANO and others known and unknown to the Grand Jury did knowingly and intentionally combine, conspire, confederate and agree to possess with intent to distribute in excess of 1,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), said

marijuana being on board the vessel *"Harry I"*; all in violation of Title 21, United States Code, *Section 846."*

All of the critical facts and acts underlying the various charges in both Indictments had occurred and were known to the prosecutors in both districts prior to the filing of the first indictment in either jurisdiction. In January, 1985, the Defendant was indicted for RICO as shown above in the Southern District of Florida. Notwithstanding the pendency of the RICO charge with the Harry I scheme as a predicate offense, *the Governmcnt then proceeded to obtain a superseding indictment in the Eastern District of Louisiana in April, 1985. This New Orleans Indictment charged conspiracies to import and possess aboard the Harry I from January, 1984 to June, 1984, which are based upon the same course of conduct for the predicate act in the Miami RICO charges.* Because the prosecutions were identical, the defendant filed a motion in the Eastern District of Louisiana for transfer of the case to the Southern District of Florida.

The Defendant was found not guilty on Counts I, II, III, and IV, which involved a load of marijuana imported on the vessel *Marenostrum* in 1983, and was convicted on the *Harry I* conspiracy Counts V and VI on June 7, 1985, in the Eastern District of New Orleans. The Louisiana conviction was affirmed at 795 F.2d 1218 (5th Cir. 1986) and certiorari is now pending in this Court, Docket No. 86-741.

The *Harry I* crimes charged in both Florida and Louisiana grow out of the selfsame act and were identical in goals, objects, participants, time span, geographical

locations involved and substantive crimes committed during said conspiracies. The Government tacitly conceded this in its Answer Brief to the Court of Appeals when it stated that:

> "[W]hile it is true that the New Orleans and Miami prosecutors each were aware generally of the others investigations and evidence before either jurisdiction returned indictments, we submit that there were sufficient factual differences to warrant the return of separate indictments in the two districts." (Government Brief in Court of Appeals, p.16)

The defendant filed a Motion to Dismiss Count I "RICO Conspiracy" and Count II "RICO Substantive" for Double Jeopardy. The motion to dismiss for violation of the defendant's double jeopardy rights was denied on August 28, 1985. The interlocutory appeal to the Eleventh Circuit Court of Appeals ensued on August 28, 1985 and was denied on September 15, 1986 and the Petition for Rehearing was denied on October 20, 1986.

Binker presented two issues on appeal to the Eleventh Circuit Court of Appeals: (1) that the offenses of conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute for which Binker had been convicted in Louisiana are lesser included offenses of the RICO conspiracy and RICO substantive counts in the Florida indictment, and prosecution on the RICO substantive and RICO conspiracy charges in the instant case is therefore barred by the double jeopardy clause; and (2) that, even if the conspiracy convictions were not lesser-included offenses, trial on the Florida RICO charges is barred by the

government's failure to exercise "due diligence" in bringing separate prosecutions in Louisiana and Florida since the facts underlying the Florida RICO charges were known to both the Louisiana and Florida prosecutors *before* the Florida indictment returned.

On September 15, 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of the Motion to Dismiss on Double Jeopardy Grounds. *United States v. Binker,* ____ F.2d ____ (11th Cir. 1986) (Appendix 1)

The Court of Appeals disposed of the argument that the RICO prosecution was double jeopardy because the conspiracies charged as a predicate act had already been prosecuted by referring to its opinion in *United States v. Boldin,* 772 F.2d 719 (11th Cir. 1985):

> ". . . Binker concedes that his first contention is precluded by this court's recent decision in *United States v. Boldin,* 772 F.2d 719 (11th Cir. 1985), *modified on reh'g,* 779 F.2d 618 (11th Cir.), *cert. denied,* ____ U.S. ____, ____, ____, 106 S.Ct. 1269, 1498, 1520, 89 L.Ed.2d 577, 899, 917 (1986). We agree." (App.I)

The Court of Appeals rendered the following opinion regarding the doctrine of "due diligence:"

> With respect to his second contention, *we do not consider whether the government's alleged failure to exercise due diligence in subjecting Binker to multiple prosecutions could constitute a double jeopardy violation because assuming, but*

expressly not deciding, that this theory would provide a ground for reversal,[3] we hold that the government exercised due diligence in bringing two separate indictments in the instant case. *First, at the time of the Louisiana indictment, there were other defendants besides Binker charged in that indictment,* and the transfer of the charges against Binker to Florida would therefore have created the possibility of two separate trials involving any of the same witnesses, evidence, and charges. In addition, *the Louisiana charges involving the vessel MARENOSTRUM probably could not have been brought in Florida,* and thus, even if the HARRY I charges in Louisiana were transferred to Florida, the government would still have had to try Binker in Louisiana on the charges involving the MARENOSTRUM. Under these circumstances, we hold that it was not unreasonable for the government to subject Binker to separate prosecutions on the Louisiana and Florida charges. (App.I).

---

[3] *Compare Boldin,* 772 F.2d at 732 (suggesting that the double jeopardy clause bars multiple prosecutions where "in the exercise of due diligence, [the government] knew or should have known of the defendants' participation in a continuing series of violations of section 848" at the time of their prior convictions, even if the prior convictions were not greater or lesser included offenses of the subsequent prosecution), *with Garrett v. United States,* ___ U.S. ___, 105 S.Ct. 2407, 2421, 85 L.Ed.2d 764 (1985) (O'Connor, J., concurring) (a prior acquittal or conviction on a lesser included offense does not bar subsequent prosecution for a greater offense where "the later prosecution rests on facts that the government could not have discovered earlier through due diligence") . . .

REASONS FOR GRANTING THE WRIT

The decision below raises important questions regarding the emerging practice by the Prosecution of deliberately splitting a crime into multiple prosecutions, thereby making a Defendant run the gauntlet of trial more than once. It also focuses the question of whether a conspiracy to import and conspiracy to possess with intent to distribute is a lesser included crime of RICO and RICO conspiracy when those conspiracies are later charged as predicate acts of RICO. This Court addressed the issue of such conspiracies as lesser included offenses of continuing criminal enterprise in *Garrett v. United States,* 105 S.Ct. 2407, 2418 (1985) and held that

> "For the reasons previously stated, we also have serious doubts as to whether the offense to which Garrett pleaded guilty in Washington was "lesser included offense" within the continuing criminal enterprise charge so that the prosecution of the former would bar a prosecution of the latter. But we may assume, for purposes of decision here, that the Washington offense was a lesser included offense, because in our view Garrett's claim of double jeopardy would still not be sustainable."

This Court went on to rule that the crimes charged in the subsequent CCE charge were ongoing and partially undiscovered at the time of the first prosecution. Moreover, this Court has never addressed the issue as it related to lesser offenses of RICO.

Due Diligence: The court of appeals determined that the due diligence doctrine established in a series of cases

including *Garrett v. United States*, 105 S.Ct. 2407 (1985), *Brown v. Ohio*, 97 S.Ct. 2221 (1977), *Jeffers v. United States*, 97 S.Ct. 2207 (1977), and *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972) was inapplicable to the case at bar. The concept of "due diligence" was best described by Justice O'Connor in *Garrett* at 105 S.Ct. 2422:

> "Moreover, I note that we do not decide in this case whether a defendant would have a valid double jeopardy claim if the Government failed in a later prosecution to allege and to present evidence of a continuing violation of §848 after an earlier conviction or a predicate offense. Certainly the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution."

The court of appeal's opinion in this cause implies that there is no rule of due diligence under the double jeopardy clause. Specifically, the court stated:

> "[We] do not consider whether the government's alleged failure to exercise due diligence in subjecting Binker to multiple prosecutions could constitute a double jeopardy violation because assuming, *but expressly not deciding, that this theory would provide a ground for reversal . . .*"

This statement constitutes a clear erosion from the established "due diligence rule."

It is respectfully submitted that the language of the instant opinion will breed uncertainty regarding the existence of the due diligence rule.

The Defendant respectfully submits that the Eleventh Circuit rationale for finding that the Government was excused from prosecuting the Defendant in a single prosecution also runs afoul of the ruling in *United States v. Garrett, supra.* In *Garrett,* the Defendant was originally charged in the Western District of Washington with three counts of an indictment. One count involved importation of 12,000 pounds of marijuana at Neah Bay on August 26, 1980. Two other counts of the indictment seem to have been unrelated to the Neah Bay importation. They are described in the *Garrett* opinion at 105 S.Ct. 2415 as "two other counts of the indictment, including causing interstate travel to facilitate importation of marijuana on or about *October 24, 1979* . . ." The clear inference in the *Garrett* opinion is that there were two unrelated charges filed in Washington.

This Court determined that the subsequent prosecution of Garrett in the Northern District of Florida was not barred by considerations of due diligence. This was so simply because the prosecution of Washington occurred *before* the completion of the continuing criminal enterprise acts which were later charged and prosecuted in the Northern District of Florida. In other words, the existence of unrelated charges in the original prosecution was not a consideration in deciding whether double jeopardy prevented the second prosecution.

Thus, the Court of Appeals, in trying to explain why "due diligence" would not bar the second prosecution relies upon reasons considered by this Court in *Garrett*

and found to have no bearing on considerations of due diligence. If such factors were allowed to defeat the double jeopardy clause, Prosecutors could eviscerate the Fifth Amendment protection by simply adding unrelated charges to any prosecution, even if the Defendants were innocent of the superfluous charges as in the instant case. The Court of Appeals has also bottomed its opinion on the supposition that if the defendant's trials were consolidated, the co-defendants in Louisiana would have to be tried separately—a supposed waste of judicial resources. This supposition by the Court of Appeals ignores the clear fact that all co-defendants in the Louisiana case had pled guilty prior to the first trial of Binker and that the only waste of judicial resources was in subjecting the defendant to a trial in Louisiana and then a trial in Florida for crimes arising from the same episode.

As the instant case makes clear, it is essential that this Court establishes the proper doctrine of due diligence as part of the double jeopardy clause. This Court should not permit the Government to fragment their charges between jurisdictions when all facts and investigation for all charges growing out of the same transaction are known before the first prosecution commences. The evil of allowing prosecutors multiple "bites at the apple" by distributing "slices of the pie" can be seen both in wasteful provincialism that will be fostered amongst prosecutors and the agonizing pincer movements that would befall the citizen accused and re-accused. Most defendants in the criminal justice system today can ill afford one trial, much less the multiple trials advocated by the Government. Judicial economy would have been promoted by trying the Defendant on all charges presented in a single prosecution instead of the two that

the Government seeks to impose. This is the first case presented to this Court where the prosecutors in both jurisdictions had exercised due diligence and discovered all facts relating to all crimes growing out of the Harry I criminal episode. In all prior cases presented to this Court, the multiple successive prosecutions were allowed either because all crimes had not been completed at the time of the first prosecution or all facts had not yet been discovered. Now that the Court is confronted with an instance where all crimes in the episode were completed and known to the prosecution before commencement of the first prosecution, the Court should clarify whether the doctrine of "due diligence" actually constitutes a bar to such successive prosecution. Otherwise, courts will continue to speculate on the meaning and applicability of the legal principle.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeals rendered September 15, 1986, would overrule the prior decisions of this Court in *Jeffers v. United States* and *United States v. Garrett* which established the doctrine of due diligence. Additionally, the Eleventh Circuit Court of Appeals dismissal of the due diligence claim on the grounds of judicial economy is factually incorrect and constitute an analysis which is improper under *United States v. Garrett.*

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Dated: Miami, Florida

December 1, 1986.

Respectfully submitted,

MELVIN S. BLACK
Suite 1002, Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622
Counsel for Petitioner

Of Counsel:

Jacob M. Denaro
504 Dadeland Square
7700 N. Kendall Drive
Miami, Florida 33156
(305) 274-9550

Richard A. Sharpstein
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133
(305) 442-8100

Appendix

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MANUEL BINKER,
Defendant-Appellant,

No. 85-5706.

United States Court of Appeals,
Eleventh Circuit.

Sept. 15, 1986.

Defendant appealed from order of the United States District Court for the Southern District of Florida, No. 85-00014-CR-ERC, Emmett Ripley Cox, J., which denied motion to dismiss RICO charges on double jeopardy grounds. The Court of Appeals held that Government had used due diligence in bringing separate drug and RICO prosecutions, so that convictions on drug charges did not preclude RICO prosecution.

Affirmed.

Criminal Law —197

Government had not failed to use due diligence in bringing RICO charges against defendant at time that it brought drug charges against him, so that RICO prosecution following drug prosecution did not violate double jeopardy, where, at time of drug prosecution, there were other defendants and transfer of charges to state

where the RICO prosecution was instituted would have created the possibility of separate trials involving many of the same witnesses and where the drug charges probably could not have been brought in the other state.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

Manuel Binker appeals from the district court's denial of his motion to dismiss the RICO conspiracy and RICO substantive counts on the ground of double jeopardy. We affirm.

On November 16, 1984, a federal grand jury indicted Binker in the Eastern District of Louisiana for, *inter alia,* two conspiracy offenses involving the vessel HARRY I: conspiracy to import marijuana, in violation of 21 U.S.C.A. §§ 952(a), 963; and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C.A. §§ 841(a)(1), 846. On April 18, 1985, a fourth superseding indictment was returned which, in addition to the two HARRY I conspiracy counts, charged Binker with conspiracy to import marijuana on board the vessel MARENOSTRUM, in violation of 21 U.S.C.A. §§ 952(a), 963; conspiracy to possess marijuana on board the vessel MARENOSTRUM with intent to distribute, in violation

*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

of 21 U.S.C.A. §§ 841(a)(1), 846; importation of marijuana on board the vessel MARENOSTRUM, in violation of 21 U.S.C.A. § 952(a) and 18 U.S.C.A. § 2; and possession of marijuana on board the vessel MARENOSTRUM with intent to distribute, in violation of 21 U.S.C.A. § 841(a)(1) and 18 U.S.C.A. § 2. On June 7, 1985, the jury convicted Binker of the two HARRY I conspiracy offenses, but acquitted him of the four counts involving the vessel MARENOSTRUM. Binker was sentenced to a term of five years imprisonment and a $15,000 fine for the importation conspiracy offense and a consecutive term of fifteen years imprisonment and a $125,000 fine for the conspiracy to possess with intent to distribute conviction.[1]

On January 9, 1985, a federal grand jury indicted Binker in the instant case in the Southern District of Florida for, *inter alia,* substantive violations of and conspiracy to violate the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968 ("RICO").[2] Prior to trial on the Florida indictment, Binker filed a motion to dismiss the RICO conspiracy and RICO substantive counts on the ground that his prosecution on these charges would violate the double jeopardy clause. The district court denied his motion to dismiss, and this appeal ensued.

Binker raises two principal issues on appeal: (1) that the offenses of conspiracy to import marijuana and

---

[1]Binker's conviction for these offenses is presently on appeal to the Fifth Circuit. *United States v. Binker,* No. 85-3614.

[2]Binker was also indicted for certain substantive offenses involving the vessel HARRY I, but these were not the same substantive offenses charged in the Louisiana indictment.

conspiracy to possess marijuana with intent to distribute for which Binker had been convicted in Louisiana are lesser-included offenses of the RICO conspiracy and RICO substantive counts in the Florida indictment, and prosecution on the RICO substantive and RICO conspiracy charges in the instant case is therefore barred by the double jeopardy clause; and (2) that even if the conspiracy convictions were not lesser-included offenses, trial on the Florida RICO charges is barred by the government's failure to exercise "due diligence" in bringing separate prosecutions in Louisiana and Florida since the facts underlying the Florida RICO charges were known to both the Louisiana and Florida prosecutors *before* the Florida indictment was returned. Binker concedes that his first contention is precluded by this court's recent decision in *United States v. Boldin,* 772 F.2d 719 (11th Cir.1985), *modified on reh'g,* 779 F.2d 618 (11th Cir.), *cert. denied,* ____ U.S. ____, ____, ____, 106 S.Ct. 1269, 1498, 1520, 89 L.Ed.2d 577, 899, 917 (1986). We agree.

With respect to his second contention, we do not consider whether the government's alleged failure to exercise due diligence in subjecting Binker to multiple prosecutions could constitute a double jeopardy violation because assuming, but expressly not deciding, that this

theory would provide a ground for reversal,[3] we hold that the government exercised due diligence in bringing two separate indictments in the instant case. First, at the time of the Louisiana indictment, there were other defendants besides Binker charged in that indictment,[4] and the transfer of the charges against Binker to Florida would therefore have created the possibility of two separate trials involving many of the same witnesses, evidence, and charges. In addition, the Louisiana charges involving the vessel MARENOSTRUM probably could not have been brought in Florida, and thus, even if the HARRY I charges in Louisiana were transferred to Florida, the government would still have had to try Binker in Louisiana on the charges involving the MARENOSTRUM. Under these circumstances, we hold

---

[3]*Compare Boldin,* 772 F.2d at 732 (suggesting that the double jeopardy clause bars multiple prosecutions where "in the exercise of due diligence, [the government] knew or should have known of the defendants' participation in a continuing series of violations of section 848" at the time of their prior convictions, even if the prior convictions were not greater or lesser included offenses of the subsequent prosecution), *with Garrett v. United States,* ____ U.S. ____, 105 S.Ct. 2407, 2421, 85 L.Ed.2d 764 (1985) (O'Connor, J., concurring) (a prior acquittal or conviction on a lesser included offense does not bar subsequent prosecution for a greater offense where "the later prosecution rests on facts that the government could not have discovered earlier through due diligence"); *Brown v. Ohio,* 432 U.S. 161, 169 n. 7, 97 S.Ct. 2221, 2227 n. 7, 53 L.Ed.2d 187 (1977) (same); *Jeffers v. United States,* 432 U.S. 137, 151-52, 97 S.Ct. 2207, 2216-17, 53 L.Ed.2d 168 (1977) (plurality opinion) (same); *United States v. Tanner,* 471 F.2d 128, 141-42 (7th Cir.) (same), *cert. denied,* 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972).

[4]The other defendants named in the fourth superseding indictment all pleaded guilty prior to trial, and Binker was the sole defendant to proceed to trial on the Louisiana indictment.

that it was not unreasonable for the government to subject Binker to separate prosecutions on the Louisiana and Florida charges.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 85-5706

D.C. Docket No. 85-00014

UNITED STATES OF AMERICA,
Plantiff-Appellee,

versus

MANUEL BINKER
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United states District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED.

---

*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

BEST A

Entered: September 15, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ [illegible]
Deputy Clerk

ISSUED AS MANDATE: OCT 28 1986

VAILABLE COPY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5706

UNITED STATES OF AMERICA,
Plantiff-Appellee,

versus

MANUEL BINKER,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITIONS FOR REHEARING
October 20,1986

BEFORE: VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Manuel Binker is DENIED.

ENTERED FOR THE COURT:

/s/ R.L. ANDERSON
United States Circuit Judge

*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.